

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION**

Bernard McFadden, #199135,	)	
	)	C/A No. 3:11-673-JMC
Plaintiff,	)	
	)	<b>OPINION AND ORDER</b>
v.	)	
	)	
Bernard McKie, <i>Warden of Kirkland CI</i> ;	)	
Mr. Latter, <i>Major of KCI</i> ;	)	
Mr. Jackson, <i>FNU Major of KCI</i> ;	)	
Mrs. Reeves, <i>FNU Sergeant of KCI</i> ;	)	
Mr. Thomas, <i>Food Service Director of KCI</i> ;	)	
Mrs. Marshall, <i>Food Service Supervisor</i> ; <i>in</i>	)	
<i>their individual or personal capacities</i> ,	)	
	)	
Defendants.	)	
_____	)	

This matter is before the court upon the Magistrate Judge’s Report and Recommendation [Doc. #9], filed on April 11, 2011, recommending Plaintiff’s motion for leave to proceed *in forma pauperis* be denied and his complaint dismissed *without prejudice* unless he pays the full filing fee of three hundred fifty dollars (\$350). The Report and Recommendation sets forth in detail the relevant facts and legal standards on this matter, and the court incorporates the Magistrate Judge’s recommendation without recitation.

**STANDARD OF REVIEW**

The Magistrate Judge’s Report and Recommendation is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge only makes a recommendation to this court; the recommendation has no presumptive weight. The

responsibility to make a final determination remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objections are made; the court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommendation, or it may recommit the matter with instructions. *See* 28 U.S.C. § 636(b)(1).

### **DISCUSSION**

Plaintiff Bernard McFadden is a *pro se* litigant petitioning for relief under 42 U.S.C. § 1983. Plaintiff specifically alleges that Defendants are providing him with inadequate amounts of food, including during a short-term prison lock-down; he further alleges retaliation, collective punishment, and lack of exercise. Plaintiff has had three previous complaints dismissed in this court as frivolous and is thus subject to the "three strikes" rule: he may not proceed with his claim unless he demonstrates he is in immediate physical harm or unless he fully prepayes the filing fee. 28 U.S.C. § 1915(g).

Plaintiff timely filed objections to the Magistrate Judge's Report and Recommendation denying the motion to proceed *in forma pauperis*. Objections to the Report and Recommendation must specifically identify the portions of the Report to which objections are made as well as the basis for such objections; failure to file specific objections constitutes a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. *See United States v. Schronce*, 727 F.2d 91, 94 & n.4 (4th Cir. 1984).

Here, Plaintiff specifically objects that one of his three previously-dismissed cases was wrongly decided and therefore should not count toward the "three strikes" rule; however, that decision was reviewed and upheld by the United States Court of Appeals for the Fourth Circuit.

*McFadden v. Allen*, C.A. No. 3:05-0887-RBH-JRM (D.S.C. Nov. 29, 2005), *aff'd*, C.A. No. 05-7952, 193 Fed. Appx. 251, 2006 WL 2226561 (4th Cir. Aug. 4, 2006). Accordingly, the court finds Plaintiff's objection without merit. Therefore, after a thorough review of the Magistrate Judge's Report and Recommendation and the record in this case, the court adopts the Magistrate Judge's Report and Recommendation [Doc. #9] and incorporates it herein.

It is therefore **ORDERED** that Plaintiff's motion to proceed *in forma pauperis* is **DENIED without prejudice**. Plaintiff shall have twenty-one (21) days from the date of this order to pay the full three hundred fifty dollar (\$350.00) filing fee or to seek an extension of time to do so. If Plaintiff fails to pay the full three hundred fifty dollar (\$350.00) filing fee or to seek an extension of time to do so, this court shall, by separate order, dismiss Plaintiff's complaint without prejudice and without issuance of service of process.

**IT IS SO ORDERED.**

s/J. Michelle Childs  
United States District Judge

June 6, 2011  
Greenville, South Carolina